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No. 09-315

IN THE

# Supreme Court of the United States

DONNA KAY BUSCH,
*Petitioner,*

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

## INTRODUCTION

Stripped of rhetoric, insinuation, and other distractions unrelated to the question that Mrs. Busch presented to this Court, respondents' opposition rests on two unpersuasive arguments. First, they assert that the majority below did not address the "issue of viewpoint discrimination or the standards applicable to such a case." Second, they allege that the clear circuit split identified in the Petition is not implicated here. As to the first argument, the "issue of viewpoint discrimination" was never in doubt before the Third Circuit: the district court found that respondents' regulation of Mrs. Busch's speech con-

stituted viewpoint-based discrimination; respondents did not challenge this conclusion before the Third Circuit; and the majority opinion upholding the discriminatory action as within a "range of reasonableness" reflects this undisputed conclusion.

As to the second argument, by upholding respondents' actions, the majority joined two other circuits that, in the wake of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), have erroneously permitted schools to regulate invited speech on the basis of viewpoint so long as such restrictions are reasonably related to pedagogical objectives—notwithstanding this Court's longstanding precedent requiring *all* viewpoint-related regulation of speech to be based on a compelling interest. To avoid this clear implication, respondents offer a construction of the Third Circuit's holding so tortuously narrow that to recite it is to demonstrate the baselessness of respondents' argument. The panel's decision resolved which standard the Third Circuit will apply to future viewpoint-based restrictions of invited speech, adding to a growing split that now reaches six circuits. This case presents a clear opportunity for the Court to settle that dispute.

## ARGUMENT IN REPLY

### A. Respondents' Factual Mischaracterizations

The vast majority of respondents' opposition is an exercise in diversion, setting forth a lengthy "Counterstatement of the Case" and advancing specious allegations that the Petition mischaracterizes the record below. While most of these inaccurate assertions are immaterial to the issues presented in the Petition, one merits discussion because it underlies

respondents' flawed legal analysis: respondents' repeated insistence that Mrs. Busch's intended participation in her son's class was a pretext for proselytizing. This insinuation reverberates throughout the opposition, starting from the very first sentence, which conspicuously identifies Mrs. Busch as an Evangelical Christian. Br. in Opp. 1. The opposition then provides a lengthy footnote containing the views of a "religion expert" who purports to know the true motives of all Evangelical Christians as they go about their daily activities. Respondents suggest Mrs. Busch intended to proselytize because "[t]he Evangelical Christian believes in the power of the Word of God to reveal God and to make God present in the reading or preaching of the word and in the heart, mind and soul of anyone who hears the word of God." *Id.* at 1 n.1. Accordingly, respondents state Mrs. Busch's "mission" is "clear": "to spread what she believes to be the literal word of God to as many people as possible." *Id.* at 1. Citing the extensive views of the same "religion expert," respondents subsequently describe Psalm 118 as a "powerful tool for proselytizing." *Id.* at 7-9.

Respondents' attack on Mrs. Busch's motive is groundless. As an initial matter, because this case was decided on summary judgment, respondents' purported expert was never subjected to *voir dire*, and the district court did not determine whether he was qualified to offer opinion testimony under Federal Rule of Evidence 702. More significant, the Third Circuit did not make any reference to these "expert" views in its decision. What the Third Circuit *did* recognize is that Wesley Busch and his mother routinely read the Bible together at breakfast and before going to bed, and that Wesley often carries the Bible with him. Pet. App. 4a. It was thus natural

that Wesley would want to share this special experience during his "All About Me" week; and, as the Third Circuit observed, it was Wesley who asked his mother to read the Bible, after Mrs. Busch told Wesley his teacher had permitted her to read his favorite book to his class. Pet. App. 6a. Contrary to respondents' repeated insinuations, Mrs. Busch did not choose Psalm 118 to proselytize. Indeed, having been asked by Wesley to read the Bible in response to respondents' invitation for his favorite book, Mrs. Busch scrupulously avoided selecting a passage that referred to Jesus, which she believed might upset some people; she instead chose Psalm 118, because she and Wesley frequently read from Psalms and she thought the children would like Psalms, which resembled poetry. Pet. App. 6a.

Respondents' aim in attempting to recast the facts is clear: to belittle and malign Mrs. Busch as a religious zealot, and, more important, to obscure the central and unchallenged finding that respondents' regulation of Mrs. Busch's attempt to read Psalm 118 constituted viewpoint-based discrimination.[1] Mrs. Busch sought to share an activity that was meaningful to Wesley—one that respondents invited, one that he selected, one that was entirely appropriate in the context of the "All About Me" assignment, and

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[1] Respondents' disingenuous rhetoric goes so far as to suggest that Mrs. Busch believes parents have the right to read verses praising Satan, advocating Nazism, and the killing of all Christians. Br. in Opp 11-13. But to the extent her responses suggest that she is asking this Court to open a "Pandora's box," *id.* at 13, the fact is that this box is already open: three circuits have held that viewpoint-based regulation of speech cannot be based on "reasonableness" or "pedagogical objectives" but instead requires a compelling interest. *See* Pet. at 13-15. This is the same holding Mrs. Busch seeks from this Court.

one that was ultimately prohibited simply because of, in the Third Circuit's words, its "specific message." Pet. App. 15a.

### B. Respondents' Flawed Legal Arguments

#### 1. The Third Circuit Addressed Both the Issue of Viewpoint Discrimination and the Applicable Standards in Such a Case.

Respondents tersely contend that the Third Circuit "did not address" the issues of "viewpoint discrimination or the standards applicable to such a case." Br. at 23. The only support they provide for this proposition is Judge Hardiman's statement in dissent that the majority did not discuss whether respondents' regulation of Mrs. Busch's speech was "based on subject matter or viewpoint." *See id.* at 23, 29-30. Respondents read far too much into this observation, however. To the extent the majority did not discuss the distinction between content and viewpoint restrictions, that is only because no discussion was necessary: the majority began from the premise—found by the district court and unchallenged by respondents on appeal—that the regulation of Mrs. Busch's speech *did* constitute viewpoint-based restriction. Infusing its opinion with references to viewpoint-based regulation of speech, the majority then held that such restrictions could be upheld if they were "within a range of reasonableness," concluding that respondents' actions were "not unreasonable." Pet. App. 20a. It is this holding that is markedly in contrast to the decisions of three other circuits, while consistent with the decisions of two others, warranting the Court's review.

The district court's finding concerning the nature of the restriction imposed by respondents was unmistakably clear. The district court *agreed* with Mrs. Busch that "the school's action constituted viewpoint discrimination" and that "Principal Cook's explanation for his action indicates that he was motivated by a concern about the religious viewpoint of the material." Pet. App. 60a. The court further observed that respondents "had previously allowed discussions of Hanukkah, Christmas, Passover, and Easter in [the] classroom as part of the regular curriculum"; as such, "the school did not preclude all speech that dealt in any way with religion but precluded speech in this situation because it expressed a religious viewpoint." *Id.* at 60-61. Only then did the court conclude that, based on *Hazelwood*, respondents' viewpoint-based regulation was permissible under a "lower standard" than a compelling-interest standard. Pet. App. 66a.

The district court's conclusion that respondents' regulation constituted viewpoint-based discrimination was not surprising in light of this Court's decisions that discrimination based on the religious character of speech is viewpoint discrimination. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *see also C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting). And, significantly, respondents *never challenged* that finding on appeal. Thus, there was no need for the Third Circuit to compare content-based restrictions to viewpoint-based restrictions, as the district court did initially. The absence of an extensive discussion on a point that was not in controversy should not

come as a surprise to respondents and provides no basis for denying certiorari.[2]

Furthermore, the majority opinion evinces a clear understanding that the restriction was based on viewpoint, for its analysis is couched almost entirely in language denoting a viewpoint rather than subject-based restriction. The panel referred to "speech promoting religion or specific religious messages," Pet. App. 13a, and speech "promoting specific messages," *id.* at 15a. It noted the challenges raised by invited speakers "express[ing] any message of their choosing." *Id.* And it observed that Mrs. Busch's challenge to the speech restriction was based on her prohibited effort "to present a viewpoint about Wesley." *Id.* at 17a. Plainly, the Third Circuit's opinion both contemplated and relied upon the unchallenged premise that the regulation of Mrs. Busch's speech constituted viewpoint-based discrimination.

Operating from that undisputed premise, the Third Circuit then relied on *Hazelwood* and *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003), a case that relied heavily on *Hazelwood*, to hold that the viewpoint-based discrimination was permissible if "within a range of reasonableness related to preserving the school's educational goals," Pet. App. 20a—language uncannily recalling *Hazelwood*'s holding that invited speech may be regulated by a school so long as its "actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 571. In so holding, the Third

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[2] To the contrary, that the viewpoint-based nature of the restriction is undisputed demonstrates that this case provides the Court with an excellent vehicle to resolve the proper standard to apply to such restrictions in the context of invited school speech.

Circuit squarely aligned itself with those circuits that have interpreted *Hazelwood* to permit viewpoint-based discrimination absent a compelling interest, notwithstanding that this Court has never sanctioned viewpoint-based discrimination using a "reasonableness" standard and that *Hazelwood* did not alter this longstanding precedent. *See* Pet. at 18-22.[3]

That the Third Circuit did not engage in an exhaustive review of authority from other circuits is no barrier to certiorari. The effect of the court's holding is plain: schools may place viewpoint-based restrictions on invited speech based solely on the "reasonableness" of the restriction in relation to pedagogical goals, rather than a compelling interest. This holding is consistent with two other circuits, contrary to three other circuits, and turns, like those decisions, on a reading of *Hazelwood* that is disputed. This Court should intervene to settle this question of exceptional importance.

### 2. This Case Fits Squarely Within the Circuit Split Identified in the Petition.

Respondents next assert that that the Petition fails to demonstrate a circuit split on the "issue actually decided by the Court of Appeals below" and that the cases cited in the petition evincing this divide are

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[3] Notably, the Third Circuit did not cite any of this well-established authority. Indeed, while the Third Circuit invoked *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 812-13 (1985), for the proposition that public schools may take on the characteristics of a public forum, *see* Pet. App. 11a, the court did not mention *Cornelius*'s equally well-known proposition, squarely applicable here, that the government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 473 U.S. at 806.

distinguishable. Br. in Opp. at 25-27. This argument is unavailing.

Respondents' contention rests entirely on their tortuous explanation of the "unique issue" in the case, which they describe as follows: "whether a School District may lawfully prevent a parent who is invited to share a story as part of her five-year-old son's curriculum-based show-and-tell activity from reading Bible verses aloud to a captive audience of kindergarten students in a public school classroom during class." Br. in Opp. at 25-26. To recite this description is to confirm the extent to which respondents must strain to distinguish this case from others in the well-established split.

Respondents' convoluted characterization, moreover, is not only implausible on its face, but disingenuous. Throughout the proceedings below, respondents (and *amici*) have urged that school administrators should be given wide latitude to control their classrooms, particularly kindergarten classrooms. They now suggest, however, that the rule announced by the Third Circuit applies only if the dispute includes all of the following criteria: parents rather than other authority figures, kindergarten classrooms rather than first-grade through twelfth-grade classrooms, five year-olds rather than children of a different age, show-and-tell exercises rather than other invited speech, and Bible reading rather than other expressive activity. Consistent with respondents' support for a broad holding, there is no indication in the Third Circuit's opinion that its decision is limited to the absurdly narrow circumstances respondents now articulate—nor that future cases involving viewpoint-related speech regulation in other factual settings would be decided any differently.

Finally, respondents' effort to distinguish the other cases in the well-recognized split fails. They assert that six cases cited in the Petition were "decided in the context of a high school." Br. in Opp. 26. But respondents provide no explanation why this distinction is material; and, more significant, the holdings of these cases concerning the standard to be applied to viewpoint-related restrictions of invited speech—either compelling-interest or "reasonableness"—did not hinge on any particular facet of the high-school context. This flaw in respondents' argument is confirmed by *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d Cir. 2005). There, the Second Circuit engaged in a thorough analysis of the *Hazelwood* question, including a review of many of the cases cited in the Petition, in a case involving a kindergarten student—a review that would have been completely unnecessary if, as respondents suggest, the kindergarten context is a materially distinguishing fact. That court, furthermore, eventually held in *favor* of the kindergarten student after concluding that *Hazelwood* did not *sub silentio* overrule decades of this Court's precedent requiring a compelling interest before imposition of viewpoint-based speech restrictions.

Respondents' only response to *Peck* is wholly unpersuasive: first, they return to their meandering and implausibly narrow characterization of the facts in the instant case; and second, they sidestep the issue completely by maintaining that "Wesley's expression was honored" because a poster Wesley created was displayed. Br. in Opp. 27. But that form of expression has never been at issue. This case is about Mrs. Busch's attempt to read a book that Wesley had selected, after being invited to do so in conformance with a curricular exercise, and then

being prohibited from doing so because it expressed a particular viewpoint. The Third Circuit upheld this restriction because it was "within a range of reasonableness related to preserving the school's educational goals," Pet. App. 20a. In so doing, the Third Circuit aligned itself with the First and Tenth Circuits and against the Second, Ninth, and Eleventh Circuits on the critical question of how *Hazelwood* has affected this Court's longstanding prohibition against viewpoint-based speech restrictions absent anything less than a compelling interest. This Court should grant certiorari to resolve the split, remain consistent with its well-established precedent, and reverse the decision of the Third Circuit.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted

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